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No. 90-5319

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

PAUL McNEIL, Petitioner,

v.

STATE OF WISCONSIN, Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF WISCONSIN

BRIEF OF THE APPELLATE COMMITTEE OF THE CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION AS AMICUS CURIAE ON BEHALF OF RESPONDENT

Appellate Committee of
The California District
Attorneys Association

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BRIEF OF THE APPELLATE COMMITTEE OF THE CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION AS AMICUS CURIAE ON BEHALF OF RESPONDENT

Amicus Curiae, the Appellate Committee of the California District Attorneys Association, and George W. Kennedy, District Attorney of Santa Clara County, are filing this brief accompanied by the written consent of all parties pursuant to Rule 37.3, Rules of the Supreme Court of the United States.

INTEREST OF *AMICUS CURIAE*

The Appellate Committee of the California District Attorneys Association is a committee created by an association consisting of the District Attorneys of the State of California and their deputies. It has been established in order to utilize and coordinate the resources of District Attorneys throughout the State, for the purpose of presenting their views on behalf of the People of the State of California in cases which may have major statewide impact upon the prosecution of criminal cases. One member of the Association is the District Attorney of Santa Clara County. Upon review of the instant matter -- which raises the question of the permissibility of police-initiated interrogation of a suspect on uncharged offenses following his appearance with counsel on a charged case, or his in-court request for counsel on that

case -- the Committee, including a representative of the District Attorney of Santa Clara County, has concluded that the outcome of this case shall likely have substantial impact upon the administration of criminal justice throughout California. *Amicus* also believes that the *amicus curiae* brief presently submitted with the consent of all parties of record "brings relevant matter to the attention of the court that has not already been brought to its attention by the parties" in that the brief submitted by *Amicus* focuses upon the adverse impact of the rule sought by Petitioner upon legitimate law enforcement activities. Rule 37.1, Rules of the Supreme Court of the United States.

SUMMARY OF ARGUMENT

In practice, the rule sought by Petitioner would be routinely invoked through the appearance of suspects in custody with counsel, or through dialogue between the court and an accused at early stages of criminal proceedings. Given new and pending technology -- through which law enforcement is increasingly able to learn that an individual in custody may have been involved in an unsolved crime -- the rule sought by Petitioner would have broad impact. The prohibition against questioning individuals who have simply appeared with counsel, or indicated a desire for counsel in a pending case, would be invoked in situations where an individual has never demanded counsel during interrogation and would be advised, prior to questioning, of his rights under the *Miranda* decision. In this context, the

rule sought by Petitioner would needlessly burden investigation of numerous crimes, impacting upon law enforcement in a fashion not envisioned in prior decisions of the Court, and without the justification previously found for extending the "prophylactic rules" protecting constitutional rights.

ARGUMENT

I

THE ADVERSE IMPACT OF THE RULE SOUGHT BY PETITIONER IS SUBSTANTIAL AND NOT JUSTIFIED BY A NEED TO FURTHER SAFEGUARD CONSTITUTIONAL RIGHTS OF AN ACCUSED

Petitioner herein asks this Court to announce a bright line rule: "A defendant who at an initial appearance or similar proceeding requests counsel or appears with counsel may not be questioned by police while he remains in continuous custody unless the defendant himself initiates

interrogation." Petitioner's Brief, page 30.

In essence, Petitioner asks this Court to extend the rule of *Michigan v. Jackson*, 475 U.S. 625 (1986), which concerned interrogation about a charged crime after the accused had requested counsel at arraignment. There, the Court held that "if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right ~~to~~ counsel for that police-initiated interrogation is invalid." *Id.*, at 636.

According to Petitioner, this extension of the rule of *Michigan v. Jackson* would be consistent with *Arizona v. Roberson*, 486 U.S. 675 (1988), which applied *Edwards v. Arizona*, 451 U.S. 477 (1981), to prohibit police, after a suspect requests counsel during custodial

interrogation, from initiating questioning about any other occurrence. Under *Minnick v. Mississippi*, 498 U.S. ___, 111 S.Ct. 486 (1990), the rule sought by Petitioner would presumably bar any police-initiated questioning on unrelated, uncharged crimes outside the presence of counsel, once an individual has appeared with an attorney or indicated in court a desire for representation.

The rule sought by Petitioner is not one of Constitutional command, but represents a potential extension of "prophylactic standards" adopted by the Court to safeguard the Fifth Amendment privilege against self-incrimination. In announcing prior rules of a prophylactic nature, this Court has found any adverse impact upon law enforcement outweighed by the need to safeguard constitutional values. In the context of the present

matter, however, the adverse impact upon law enforcement is substantial, and not justified by the need to further safeguard the right against self-incrimination, or the right to counsel.

A.

Because Individuals Charged With Serious Crimes Routinely Appear Early With Counsel, Or Indicate In Court A Desire For Representation, The Rule Sought By Petitioner Would Have Broad Impact Upon Law Enforcement

Under the Sixth Amendment, "a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him -- 'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" *Brewer v. Williams*, 430 U.S. 387, 398 (1977). The right to counsel under the Sixth Amendment exists at every "critical stage" of a criminal proceeding. *White v. Maryland*, 373 U.S. 59, 60 (1963).

The States have enacted various procedures to enforce the Sixth Amendment right to counsel. When a person is charged with a serious offense, these procedures routinely result in the early appearance of counsel, or an indication by the accused of a desire for representation in the case. For instance, in California, Penal Code section 987 requires that defendants appearing at arraignment without counsel be informed of the right to representation. In capital cases, the court must tell the individual that representation is required, and must inquire about the retention or appointment of counsel. Cal. Penal Code sec. 987(a). With regard to noncapital cases, the statute provides:

> ". . . if the defendant appears for arraignment without counsel, he shall be informed by the court that it is his right to have counsel before being arraigned, and shall be asked if he desires the assistance of

> counsel. If he desires and is unable to employ counsel the court shall assign counsel to defend him." Cal. Penal Code sec. 987(b).

Analogous provisions exist in most jurisdictions, leading in serious cases to the early appearance of counsel, or the early indication of a desire for counsel on the charge.[1] At the very least, the

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[1] See, Ala. Code sec. 15-12-20 (1975) (trial judge required before arraignment to ascertain from accused whether he or she desires assistance of counsel); Alaska Crim. R. 39(a) (if appearing at arraignment without an attorney, the accused must be asked if he desires the aid of counsel); Ariz. Crim. Pro. R. 4.2 (at the "initial appearance", the magistrate must inform of the right to counsel, and appoint counsel if the accused is eligible and so requests); Ark. Stat. Ann. sec. 16-85-703 (1987) (if any person is to be arraigned on a felony without counsel, it is the duty of the court to inquire and appoint an attorney); Colo. R. Crim. Pro. 5(a)(2) (at "first appearance" of accused, court must inform of rights to counsel and appointed counsel); Conn. Gen. Stat. Ann. secs. 54-1b, 54-63c (1958) (defendant must be informed of rights at arraignment); Del. Super.Ct.Crim.R. 44(a) (advice and appointment of counsel at appearance in

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superior court); D.C. Sup. C. Crim. R. 44-I (appointment of counsel for proceedings before that court); Fla. R. Crim. Pro. R. 3.111 (appointment of counsel at formal charging, first appearance before magistrate, or as soon as feasible after custodial restraint, whichever occurs earliest); Ga. Code Ann. sec. 27-3315 (1981) (appointment of counsel for indigent defendants); Haw. Rev. Stat. secs. 802-2, 802-5 (1985) (if accused entitled to counsel, court shall inform of right and appoint if indigent); Idaho Code secs. 19-852, 19-853 (1987) (duty of court to clearly inform of right to counsel upon formal charge or hearing); Ill.Rev.Statutes ch. 38, secs. 113-1, 113-3 (1973) (allowance and appointment of counsel prior to plea); Ind. Code Ann. sec. 35-33-7-5 (accused must be informed of right to counsel and assigned counsel where appropriate at "initial hearing"); Iowa Code Ann. sec. 813.2 and Iowa R. Crim. P. 2 and 26 (court shall inform of rights to counsel and appointed counsel at "initial appearance"); Kansas Stat. Ann. sec. 22-4503 (1980) (if accused appears at any stage of proceeding without counsel, court has duty to inform and appoint); Ky. R. Crim. Pro. 3.05 (at time of appearance, court shall inform of right to counsel, and, if confinement possible, shall appoint counsel unless defendant declines); La. Code Crim. Pro. secs. 230, 230.1 (right to counsel or appointed counsel from time of arrest; duty to bring arrested person in custody before judge within 72 hours for purpose of appointment of counsel); Me. Rev. Stat., tit. 15, sec. 810 (1982) and

Me. R. Crim. Pro. 44 (before arraignment on felonies, assignment of competent counsel); Md. Code Ann., tit. 4, Md.R.C.C. 4-213, 4-202(a) (when accused appears before judicial officer, court must require accused to read notice of right to counsel); Mass. R. Crim. Proc. 7(a) (at an initial appearance, if the court finds defendant cannot afford counsel and desires representation, counsel shall be assigned or appointed); Mich. G.C.R. 1963 785.4 (at arraignment, court must personally advise defendant of right to counsel, and appoint counsel if requested; at each subsequent proceeding, accused must have counsel or reaffirm waiver); Minn. Stat. Ann. sec. 49, R. Crim. Pro. 5.01(b) (West 1990) (at initial appearance, defendant without counsel advised of rights, and counsel appointed if defendant indigent); Miss. Code Ann. sec. 99-15-15 (1972) (accused has right to counsel at every critical stage of proceeding, and court may appoint, interpreted in *Conn v. State*, 251 M. 488, 170 So.2d 20 to require appointment if defendant indigent); Mo. R. Crim. Pro. 24.02(b) (before plea, court must inform unrepresented defendant of rights to counsel and appointed counsel); Mont. Code Ann. sec. 46-12-202 (1989) (if defendant appears for arraignment without counsel, court must advise of rights to counsel and appointed counsel); Neb. Rev. Stat. sec. 29-1804.05 (at first appearance of accused in felony or misdemeanor subject to imprisonment, court shall inform of right to counsel and, if defendant asserts indigency, make inquiry and appoint if appropriate); Nev. Rev. Stat. sec. 171.186

(prior to preliminary hearing, court shall advise defendant of right to counsel and appointed counsel); N.H. Rev. Stat. Ann. (1986) 604-A:2 (if defendant appears without counsel, court shall advise of rights and follow procedures for determination of indigency unless defendant waives appointment); N.J. Crim. Prac. R. 3:2-3 (at first appearance, magistrate shall advise of right to counsel and, if defendant is indigent, shall commence procedures for appointment, unless defendant affirmatively states his intention to proceed without counsel); N.M. R. Crim. Pro. M. C. 8-501 (5) & (6) (upon first appearance, court must inform defendant of rights to counsel and appointed counsel); N.Y. Crim. Pro. Law sec. 170.10 (4) (at arraignment, court must inform defendant of rights to counsel and "must itself take such affirmative action as is necessary to effectuate them."); N.C. Gen. Stat. sec. 15A-942 (1984) (at arraignment, court shall inform unrepresented defendant of right to counsel, must afford opportunity for exercise of right, and must take action necessary to effectuate that right); N.D. R. Crim. Pro. 10, 44 (at arraignment, court must inform unrepresented defendant of rights to counsel and appointed counsel); Ohio R. Crim. Pro. 10(c) (when defendant brought before court without counsel, and called upon to plead, court shall determine that he understands rights to counsel and appointed counsel); Okla. Stat. Ann., tit. 22, sec. 464 (at arraignment, defendant without counsel must be informed of rights to counsel, and counsel appointed if

appropriate); Or. Rev. Stat. sec. 135.040 (at arraignment, defendant without counsel shall be informed of right to counsel and asked if he desires aid of counsel); Pa. R. Crim. Pro. 303, 42 Pa.C.S.A. (as indicated by comment of leg. committee, a main purpose of arraignment is "to consider defendant's right to counsel" if he is unrepresented); R.I. S.C. Crim. R. and D.C. Crim. R. 44 (if defendant appears without counsel, court shall advise of right to counsel and appoint counsel unless defendant is able to retain attorney or elects to proceed without counsel); S.C. Code Ann. sec. 17-3-10 (1976) (any person entitled to counsel under the laws of the United States shall be advised of that right and "if it is determined that the person is financially unable to retain counsel then counsel shall be provided); S.D. Codified Laws Ann. sec. 23 A-40-6 (1988) and *Warner v. Jamison*, 77 S.D. 340, 91 N.W.2d 743 (1958) (when accused appears at arraignment, he is required to demand or waive counsel immediately); Tenn. Code Ann. sec. 40-14-202 (1990) (in felony cases, court must follow procedure for determination of indigency and advisement of right to counsel); Tex. Crim. Pro. Code Ann, Art. 26.04 (at arraignment, court must inform of right to counsel and appoint counsel if defendant indigent); Utah Code Ann. sec. 77-32-2 (1953) (counsel assigned to represent each indigent person under arrest if defendant requests or court orders and defendant does not affirmatively waive or reject opportunity for representation); V. R. Cr. P. 5 (d) & (e) (when accused brought before judicial

practice of the various courts will, in most instances, require police to assume that a person accused of a serious crime has either appeared with counsel, or indicated in some fashion -- very probably

officer, he shall be informed of right to counsel and appointed counsel and until defendant consults with counsel, no further proceedings unless he waives right to attorney); Code of Va. sec. 19.2-157 (if defendant appears without counsel in case punishable by death or imprisonment, court shall inform of rights to counsel and appointed counsel and allow reasonable opportunity to employ or execute statement of indigency); Wash. Sup. C. Crim. R. 3.2 (A) (at preliminary appearance, court shall orally inform defendant or rights to counsel and appointed counsel); W. Va. Code. sec. 62-1-6 (1966) (at initial appearance, duty of magistrate to inform defendant of right to counsel and to afford opportunity for consultation); Wis. Stat. Ann. sec. 970.02 (at initial appearance, court shall inform unrepresented defendant of right to counsel and, if defendant claims or appears to be indigent, shall refer for determination); Wyo. R. Crim. P. 6 (right to counsel at every stage of proceeding from initial appearance through appeal unless defendant waives such appointment).

in response to inquiry from the court -- that he desires representation.

Thus, in practice, the rule sought by Petitioner would have broad impact upon law enforcement activities. Application of the rule would not be confined to situations where an accused has taken action on his own to demand counsel to intercede between him and the state. The prohibition sought by Petitioner would be triggered routinely in cases involving serious charges, casting a wide net upon the ability of police to question individuals in custody about unrelated matters without the presence of counsel.

B.

The Rule Sought By Petitioner Would Impede Investigation Of Unsolved Crimes, Without Sufficient Justification

In a growing number of situations, law enforcement discovers that an individual

booked on one crime may be involved in a separate matter. As noted by Justice Kennedy in his dissent to *Arizona v. Roberson*, "[w]hen a suspect is in custody for even the most minor offense, his name and fingerprints are checked against master files." 486 U.S. at 689. "It is a frequent occurrence that the suspect is wanted for questioning with respect to crimes unrelated to the one for which he has been apprehended." *Id.*

With the development of more sophisticated means to "match" arrested individuals with those wanted for questioning on other matters, the number of situations in which police desire to question about other matters will surely increase. For instance, in California, the California Identification (Cal-ID) System's Remote Access Network permits statewide access to computerized fingerprint

databanks, facilitating the location and identification of suspects. Access to similar information from the records of nine Western States will soon be routinely available in California, followed in the foreseeable future by access to nationwide databanks.

As noted above, under the rule sought by Petitioner, law enforcment would be required to work with the substantial probability that an individual in custody on a serious offense has invoked the right to counsel. If the procedures of a particular jurisdiction are such that the accused may *not* yet have done so, police would presumably be required to ascertain whether the individual has appeared with counsel, or indicated a desire for representation at a court appearance. See, *Michigan v. Jackson*, 475 U.S. 625, 634 ("One set of state actors (the police) may

not claim ignorance of defendants' unequivocal request for counsel to another state actor (the court).") Given the volume of cases in many criminal jurisdictions, this requirement may represent more than a minimal undertaking, particularly where the law enforcement officer seeking to question the individual is handling a separate matter, and is not likely to have appeared at arraignment, or to be involved in the processing of the other charge through the courts.

In the many cases where the individual has appeared with counsel, or requested counsel, application of the rule of *Minnick v. Mississippi* would bar police-initiated interrogation absent the physical presence of counsel. In cases where the individual has never expressed a request for representation during *interrogation*, and would be warned of his rights under the

Miranda decision, police would nonetheless be required to locate and wait for counsel, even in situations where the individual may be willing to discuss the separate matter without an attorney. In addition to the time spent by law enforcement officials on this requirement, and the attendant delay, the requirement of presence of counsel may needlessly burden the time of the attorney for the defendant, where the individual has never indicated a desire for representation during interrogation. If the attorney has been appointed by the state, the governments providing counsel would also be burdened through added expenditures in compensating attorneys, in situations where the accused has not indicated at any point a desire for representation during questioning by police.

In *Michigan v. Jackson*, the Court rejected arguments regarding burdens upon

law enforcement where police cannot initiate interrogation on a charged offense following a request for counsel at arraignment. Under the rule sought by Petitioner, however, the burdens upon police are more sweeping. In the *Michigan v. Jackson* situation, police have already arrested the individual on the particular crime, and a prosection has commenced. By that stage, law enforcement can be expected to have performed routine factual investigation of the matter, including preliminary discussions with the suspect if the suspect is willing to provide information. Thus, any burdens associated with prohibition against *further* questioning are alleviated by the ability of police to investigate their case prior to arrest and the commencement of charges.

In the case of uncharged, unrelated offenses, however, police often do not know

about the other matter until *after* the person has been arrested and booked on the offense. Under those circumstances, a prohibition against police-initiated questioning would affect cases in which police have not had the opportunity even to pose preliminary questions to the individual. Particularly in cases where there appears to be a "match" between an individual in custody and a person suspected of involvement in another crime, the entire matter may be resolved through a few preliminary questions. For instance, the individual may be able to explain in a few words that he is not the other person, or was not in the place where the other crime occurred. Where the individual has not indicated any desire for counsel during questioning, it is difficult to justify a rule that does not permit police even to ask the individual outside the presence of

counsel if he wants to discuss the unrelated matter.

In *Arizona v. Roberson*, the Court rejected arguments referencing the practical realities of law enforcement and an individual's likely response to interrogation. In that case, Justice Kennedy pointed out in dissent that a "realistic view of human nature suggests that a suspect will want the opportunity, when he learns of the separate investigations, to decide whether he wishes to speak to the authorities in a particular investigation with or without representation." 486 U.S. at 692. The majority's justification for rejecting this premise was, of course, the prior assertion by the individual of a desire for representation *during interrogation*. According to the Court, any interrogation, even on an unrelated matter, of "a suspect

who has indicated his inability to cope with the pressures of custodial interrogation by requesting counsel . . . will surely exacerbate whatever compulsion to speak the suspect may be feeling." 486 U.S. at 686.

Unlike the situation in *Arizona v. Roberson*, the situation now before the Court does not involve an individual who has "indicated his inability to cope with the pressures of custodial interrogation by requesting counsel." There is not, therefore, the same constitutional interest justifying the impediment placed upon law enforcement by the rule sought by Petitioner. Where the individual has never requested counsel during interrogation, there is no increased danger of "badgering" or "loosening up" through questioning about a separate matter. Where the accused will be read his *Miranda* rights prior to any

custodial interrogation, there is no reason to believe he will be unable to demand an attorney or refuse to answer questions relating to uncharged matters.

In *Arizona v. Roberson*, Justice Kennedy argued in dissent that constitutional interests did not justify the rule adopted in that case. His words apply with force to the present situation:

> "[T]he rule of *Edwards* is our rule, not a constitutional command; and it is our obligation to justify its expansion. Our justification must be consistent with the practical realities of suspects' rights and police investigations." *Arizona v. Roberson*, 486 U.S. 675, 688.

Drawing further upon the words of Justice Kennedy, Amicus submits that the rule sought by Petitioner "is not necessary to protect the rights of the suspects, and it will in many instances deprive our nationwide law enforcement network of a

legitimate investigative technique now routinely used to resolve major crimes." *Id.*

CONCLUSION

For the foregoing reasons, Amicus respectfully submits that the rule sought by Petitioner should be rejected, and the judgment of the Wisconsin Supreme Court upholding his conviction affirmed.

Dated at San Jose, California, January 10, 1991.

Respectfully submitted on behalf of the Appellate Committee of the California District Attorney's Association, and the District Attorney of Santa Clara County

GEORGE W. KENNEDY
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